



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 260 OF 2011**

*(Before D.K.N. Marete)*

**SALOME AKOYA & 22 OTHERS.....CLAIMANT**

Versus

**EAST AFRICAN GROWERS .....RESPONDENT**

**JUDGEMENT**

By a memorandum of claim dated 23rd February, 2013 this matter saw the light of the day. The issue in dispute is therein cited as;

**“Unlawful termination and refusal to pay terminal dues of twenty three(23) named grievants/claimants.”**

The respondent in a response to memorandum of claim dated 15th March, 2011 denies the claim and prays that the same be dismissed with costs.

The claimants/grievants case is that on diverse dates between May, 1995 and May, 2010, they were employed by the respondent. They commenced employment with the respondent on diverse dates from May, 1985 and were engaged in sorting and packaging fresh horticultural produce for export. The grievants submit that during their employment, they were subjected to inhuman conditions and unfair labour practices. At all material times to their employment, the grievants worked in a chilled room and on produce from a cold room but were never provided with protective gear and or clothing to protect them from these extreme conditions. They were also never issued with payslips or any itemised pay statement but were paid through a special ATM system that would only release amounts of Ksh.100.00 and beyond and any lesser amounts were forfeited.

The claimants further submit that on diverse dates between March, 2010 and May, 2010 all of them were verbally dismissed by the respondents and thereon the respondent’s security personnel barred them from accessing the respondents’ premises.

The claimants were not unionized and all attempts to realize their claim have been frustrated by the respondent. They cite their claim as;

- i. *Notice period*
- ii. *Payment of days worked but not paid for*
- iii. *Payment of all overtime worked and not paid for*
- iv. *Service of 15 days of each completed year of service*
- v. *Arrears in respect of House Allowance Ksh.1,500.00 per month*

- vi. Arrears in respect to the underpayments
- vii. Unlawful deductions made not remitted
- viii. All amounts withheld in ATM machines
- ix. Arrears in commuting allowance of Kshs.1,500.00 per month
- x. Certificate of service
- xi. ProRata leave for the period worked

They therefore pray that;

1. *The verbal termination of the Grievants/Claimants be and is hereby declared unlawful and hence null and void.*
2. *The Respondent do re-engage all the Grievants/claimants in work comparable to that in which the Grievants/claimants were employed prior to their dismissal or other reasonably suitable work at the same wages with no loss of benefits together with salaries and allowances in arrears for both the period they have been working and out of office/work.*
3. *Reinstate the Grievants and treat them in all aspects as if the Grievants employment had not been terminated.*

*In the alternative to demand for reinstatement of all the Grievants/claimants demand for payment for each claimant as under:-*

1. *Each grievant/claimant to be paid a reasonable notice pay in lieu of 12 months.*
2. *Each claimant be paid 12 months gross salary as compensation for loss of employment.*
3. *Each grievant/claimant be refunded all unlawful deductions.*
4. *Each grievant/claimant be paid for all days worked and not paid.*
5. *Each grievant/claimant be paid for overtime not paid.*
6. *Each grievant/claimant to be paid accumulated commuting/travelling allowance since commencement of employment.*
7. *Each grievant/claimant be paid House Allowance not paid from date of commencement of service employment till termination.*
8. *Each grievant/claimant be refunded any withheld amounts in their respective ATM's*
9. *Any other statutory entitlements.*
10. *The Respondent do issue the Grievants certificates of service.*
11. *Pro-rate leave for the period worked.*

The respondent denies the claim. She also disclaims knowledge of some of the claimants and puts them in strict proof of their cases and employment relationships. The respondent further submits that the known claimants were casual labourers engaged on diverse dates between January, 2010 to May, 2010 and left on their own volition while others refused to sign employment contracts as required and are therefore not entitled to the terminal benefits as claimed.

The respondent denies that this cause raises issues of conditions of employment and avers that no specific complaints are raised on the contraction of any disease in the course of duty. This therefore is merely an issue of wrongful termination and should be deemed as such. The issue of misconduct on her part in the ATM salary payment is also denied. On termination, the respondent submits that the grievants/claimants

left employment on their own volition when they were requested to sign employment contracts in accordance with the law. The claimants were casual labourers and therefore not entitled to the claim and also the absence of dismissal ousts the claim as stated.

The respondent prays that the court finds as follows;

1. **THAT** there was no termination of services whether verbal or written by the respondent.
2. **THAT** the remedy of re-engagement of the claimants in similar positions with no loss of benefits is inapplicable and not known in law as there was no employment relationship between the claimants and the respondent herein.
3. **THAT** the remedy of reinstatement is not available to the claimants herein.
4. **THAT** notice pay is not payable to the claimants under the employment Act, 2007.
5. **THAT** compensation is inapplicable.
6. **THAT** no deductions have ever been made from the daily wages payable to the claimants.
7. **THAT** the claimants never worked for any overtime and if at they worked the same was paid.
8. **THAT** the travelling allowance is not known in law as part of any terminal benefits that the claimants may be entitled to and in any even the respondent provides for transport of all it's employees free of charge.
9. **THAT** no house allowance is applicable as the claimants were casuals who left employment when they were asked to sign contracts which they declined.

The issues for determination therefore are;

1. Who of the claimants indeed were employees of the respondent?
2. Were the claimants permanent or casual employees of the respondent?
3. Was the employment of the claimants terminated by the respondents and if so,
4. Was the termination of the employment of the claimants wrongful, unfair and unlawful?
5. Are the grievants/claimants entitled to the relief sought?
6. What is the relief sought?
7. Who bears the cost of the cause?

This matter came for hearing severally until the 17th September, 2013 when the parties agreed to dispose of the matter by way of witness statements and written submissions for each.

It is instructive that the issues in dispute are fathomable and ascertainable by this court. However, due to the intricate issues on facts raised in the matter, I think the best way of dealing with the issues is through the Labour Officer who would be in a better position to thrash the issues and comprehensively and clearly ascertain the contractual, economic and legal positions of the parties, if at all. It is apparent from the facts of the case and other available data that this dispute involves deep rooted issues of facts and evidence which are not clearly spelt out in the witness statement and other pleadings before court. The route towards ascertainment of the issues in dispute would be through thorough investigations into the entirety of the opposing positions of the parties. This is grounded in the new found approach of reliance on alternative dispute resolution as espoused under Article 159, Constitution of Kenya, 2010 and Section 15 of the Industrial Court Act, 2011 as follows;

*Article 159(2)(c) and 159(3),*

*In exercising judicial authority, the courts and tribunals shall be guided by the following principles -*

(2)(a).....

(b).....

(c) *alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*

(3) *Traditional dispute resolution, mechanisms shall not be used in a way that –*

a. *contravenes the Bill of Rights*

b. *is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or*

c. *is inconsistent with this constitution or any other written law.*

Section 15 of the Industrial Court Act, 2011 also brings out a case for alternative dispute resolution and its application to labour relations.

*15.(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.*

(2) *The Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is satisfied that there has been no attempt to effect a settlement pursuant to subsection (1).*

(3) *Subject to any other written law, a certificate issued by a conciliator accompanied by the record or evidence of the minutes of the conciliation meetings giving reasons for the decisions as arrived at by the conciliator, shall be sufficient proof that an attempt has been made to resolve the dispute through conciliation, but the dispute remains unresolved.*

(4) *If at any state of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.*

(5) *In the exercise of its powers under this Act, the Court shall be bound by the national wage guidelines on minimum wages and standards of employment, and other terms and conditions of employment that may be issued, from time to time, by the Cabinet Secretary for the time being responsible for finance.*

I find that this matter is well fitted to S.15(4) of the Act as above cited and refer the dispute for conciliation before a Labour Officer. I therefore order that this matter be referred to the Commissioner for Labour with directions to deal or refer this matter to a Labour Officer to deal as follows;

- i. Ascertain the industrial relationship of the claimants and respondents in this dispute.
- ii. Through testimony, documents and or any other evidence verify the claim vis-à-vis the defence in this cause.
- iii. Ascertain and confirm the positions of the parties cases as presented in evidence.
- iv. Calibrate and compute the amounts, if at all, payable to each of the claimants.
- v. Determine the claims and amounts payable to the claimants.

vi. Determine a case for reinstatement of the claimants.

vii. File and present a report with this Court within ninety (90) days from today's date.

viii. Appear in court and present the report at a mention of this matter on 1st April, 2014 at 900 hours.

It is so ordered.

Dated, delivered and signed the 4th day of March, 2014.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Ongicho instructed by Ongicho – Ongicho & Company Advocates for the claimants.
2. Mr. Nyabeni instructed by Omwoyo, Momanyi, Gichuki & company Advocates for the respondent.